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In The

Supreme Court of the United States

October Term, 1981

STATE OF WASHINGTON, et al.,
Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE
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Japanese American Citizens League

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BRIEF OF AMICUS CURIAE SEATTLE CHAPTER, JAPANESE AMERICAN CITIZENS LEAGUE

INTEREST OF THE SEATTLE CHAPTER OF THE JAPANESE AMERICAN CITIZENS LEAGUE

The Japanese American Citizens League (JACL) consists of over 100 local chapters throughout the U.S. representing over 29,000 members. Founded in 1930, JACL has

involved itself in many civil rights issues in Washington State, seeking court and legislative remedies. The Seattle Chapter has also gone on record supporting the Seattle Plan of the Seattle School District which includes but is not limited to the mandatory reassignment of students.

It has been JACL's belief that the public schools should be a model of an integrated society and reflect that belief through the promotion of equal educational opportunity which enhances the diverse ethnic and racial differences of American society.

It is JACL's belief that Initiative 350, if allowed to stand, would create segregated schools based upon race and severely limit the educational opportunity for all students, particularly those of Asian ancestry - Japanese, Chinese, Filipino, Korean, Vietnamese, and others from

Southeast Asia and the Pacific Islands. This restrictiveness, due largely to housing patterns, would create schools further segregated by ethnic Asian communities, thus cutting them off from educational opportunities available within a school district.

In the past, school desegregation efforts have focused predominately on the needs of Black and White students. Washington State schools, with its large Asian population, must consider language and ethnic diversity in its desegregation efforts and these must be addressed through an overall district wide basis rather than as a separate, centralized and segregated community within the district.

JACL believes that Asian students of Washington State should have no barriers to their educational opportunity and that lower court rulings which have invalidated Initiative 350 should be upheld.

QUESTION PRESENTED

Does a state initiative passed by the voters of the State of Washington which forbids mandatory student assignments for racial reasons but permits such student assignments for purposes unrelated to race, create an impermissible legislative classification based upon racial criteria thereby rendering the initiative unconstitutional?

ARGUMENT

A. Introduction

We are in agreement with the statement of the case made by the appellee Seattle School District No. 1 in their answer to Appellant's Brief. In addition to that statement, we point out that Asians[1] constitute the second largest minority school population in the Seattle School District No. 1[2].

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[1] The use of the term "Asian" in this brief corresponds to the "Asian/Pacific Islander" racial identification code utilized in the publication, 1978-79 Racial Distribution of Students and Staff.* Seattle Public Schools, 1978-79 Racial Distribution of Students and Staff, Volume I: Students (Seattle Public Schools, December 15, 1978), p. 2.

[2] Asian students in the Seattle Public Schools number 5,846 (10.8% of the district-wide school population). Seattle Public Schools, 1978-79 Racial Distribution of Students and Staff, p. 199.

*The identification includes Chinese, Filipino, Japanese, Korean, Vietnamese, Southeast Asian, East Indian and Samoan school children.

Asians in Seattle have been traditionally segregated/isolated in the Beacon Hill, Rainier Valley and Southeastern section of the city. A 1977 study of the distribution of the minority school population in Seattle reported that the Japanese and Chinese remained concentrated in the Beacon Hill and the Rainier Valley neighborhoods[3]. The report showed that Samoans

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[3] Seattle Public Schools, Schools and Neighborhoods Research Study, Minority Population Shifts in the Seattle Area, (City of Seattle and Seattle Public Schools, October, 1977), pp. 27-28.

In the 1977-78 school year, there were 5,668 (9.7%) Asians in the District-wide school population. The Chinese students numbered 1,707 (2.9%) and the Japanese students numbered 1,242 (2.1%). Seattle Public Schools, 1977-78 Racial Distribution of Students and Staff, Volume I: Students (Seattle Public Schools, December 10, 1977), p. 177.

In the 1980-1982 school year, there were 7,300 (15.1%) Asians in the district-wide school population. The Chinese students numbered 1,933 (4.0%) and the Japanese students numbered 874 (1.8%). Seattle Public Schools, 1980-1981 Racial Distribution of Students and Staff, Volume I: Students (Seattle Public Schools, November 15, 1977), p. 4.

predominantly resided in Southeast Seattle[4] and the Filipino population was becoming increasingly concentrated in that same geographical area[5].

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[4] Seattle Public Schools, Schools and Neighborhoods Research Study, Minority Population Shifts in the Seattle Area, p. 37.

In the 1977-78 school year, 283 Samoan school children were enrolled in the Seattle Public Schools. Seattle Public Schools, 1977-78 Racial Distribution of Students and Staff, p. 177.

In the 1980-81 school year, 356 Samoan students were enrolled in the Seattle Public Schools. Seattle Public Schools, 1980-1981 Racial Distribution of Students and Staff, Volume I: Students (Seattle Public Schools, November 15, 1977), p. 4.

[5] Seattle Public Schools, Schools and Neighborhoods Research Study, Minority Population Shifts in the Seattle Area, p. 33.

Filipino school children numbered 1,435 (2.5%) in the 1977-78 school year. Seattle Public Schools, 1977-78 Racial Distribution of Students and Staff, p. 177.

Filipino students numbered 1,443 (3.0%) in the 1980-1981 school year. Seattle Public Schools, 1980-1981 Racial Distribution of Students and Staff, Vol. 1, p. 4.

Prior to implementation of the Seattle Plan, segregation resulted in a disproportionate concentration of Asian school children in attendance at schools such as Beacon Hill Elementary School and Dearborn Park Elementary School[6]. Such segregation/isolation within the public school system translated into inequitable and unequal educational opportunities for Asian students.

By reducing the segregation/isolation of Asian students, the Seattle Plan has afforded Asian students educational opportunities previously denied them. During the first year of implementation of the Seattle Plan, Asian school children at

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[6] In the 1977-78 school year, Beacon Hill Elementary School had 209 (56.9% of the total school enrollment) Asian students and Dearborn Park Elementary School had 138 (31.2% of the total school enrollment) Asian students. Seattle Public Schools, 1977-78 Racial Distribution of Students and Staff, pp. 17-18.

Beacon Hill Elementary School and Dearborn Park Elementary School came to constitute a number of students in the respective student bodies more proportionate to the Asian presence in the total school population[7]. At the same time, Asian school children, who were only nominally present at other schools such as Schmitz Park Elementary School, Genesee Hill Elementary School and Magnolia Elementary School prior

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[7] In the 1978-79 school year, Asian students numbered 107 (33.3% of the total school enrollment) at Beacon Hill Elementary School and 98 (25.8% of the total school enrollment) at Dearborn Park Elementary School. Seattle Public Schools, 1978-79 Racial Distribution of Students and Staff, pp. 73-74.

In the 1980-1981 school year, Asian students (30.6% of the total student population) at Beacon Hill and 77 (25.1% of the total student population) at Dearborn Park. Seattle Public Schools, 1980-81 Racial Distribution of Students and Staff, Volume I, p. 31, 33.

to the Plan, now attend those schools in greater number[8].

Finally, a major concern of the Asian American community in Seattle was the coordination of the Seattle School District's Bilingual Education Program with the district's desegregation efforts. The Seattle Plan has integrated the bilingual

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[8] Comparative figures for Asian student enrollment for the 1977-78 and 1978-79 school years are as follows:

	1977-78	1978-79	1980-81
Schmitz Park Elementary School	21 (8.3)	36 (23.8)	71 (34.8%)
Genesee Hill Elementary School	8 (2.6)	50 (25.1)	53 (22.3%)
Magnolia Elementary School	28 (7.4)	44 (17.2)	57 (19.1%)

Seattle Public Schools, 1977-78 Racial Distribution of Students and Staff, pp. 95, 94, 66.
Seattle Public Schools, 1978-79 Racial Distribution of Students and Staff, pp. 95, 94, 32.
Seattle Public Schools, 1980-81 Racial Distribution of Students and Staff, Volume I, p. 46, 37, 57.

education program into the Seattle School District's desegregation efforts such that those Asians with limited English speaking abilities are not isolated nor segregated from the rest of the student population. It should be noted that the number of Vietnamese and other Southeast Asians has tripled in the last three years[9].

B. Asian Americans Have Suffered And Continue To Suffer From Invidious Racial Discrimination In The Area Of Public Education.

1. There is a long history of invidious discrimination against Asian Americans.

For many years, Asian Americans were denied the rights of equal opportunities in

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[9] In the 1977-1978 school year, there were 381 Vietnamese and 115 other Southeast Asian students (representing together 0.9% of the total student population) in the Seattle Public Schools. In the 1980-1981 school year, there were 942 Vietnamese and 964 other Southeast Asians (representing together 3.9% of the student population) in Seattle Public Schools. Seattle Public Schools, 1980-1981 Racial Distribution of Students and Staff, Volume I, p. 4.

this country. From the time that Asian immigrants first entered the country, those of Chinese, Japanese, Filipino, and other Asian ancestry encountered laws aimed to deny them rights enjoyed by American citizens. Immigration laws were passed to deny Asian immigrants the rights to citizenship[10]. Alien land laws were passed to deny Asians the right to own land[11]. California, for example, assessed taxes on the Chinese such as a Foreign Miner's License, a passenger tax, and a Chinese Police tax (which assessed a monthly tax of $2.50 on every Chinese over the age of eighteen.)[12].

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[10] See the Chinese Exclusion Act of 1882, Act of May 6, 1882, ch. 126 § 1, 22 Stat. 58 (1882); Ozawa v. United States, 260 U.S. 178 (1922).

[11] See McGovney, the Anti-Japanese Land Laws of California & Ten Other States, 35 Cal. L. Rev. 7, p. 54 (1947).

[12] McGovney, Ibid, page 54, Appendix A, Anti-Chinese Legislation of California.

Many laws were passed to prevent Asians from being employed in a variety of occupations ranging from hairdressing to the law. The city of Seattle passed an ordinance restricting the Japanese from becoming pawnbrokers[13]. The Japanese in Washington State had no right to incorporate a business[14].

Many occupations in Washington State required United States citizenship. But for many years, Asians could not be naturalized and were "ineligible for citizenship". Aliens in Washington State could not: serve as a justice of the peace; serve process; become optometrists; become medical examiners; teach in the public schools on a permanent basis; incorporate a

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[13] Seattle City Ordinance passed in July, 1921, upheld in Asakura v. Seattle, 122 Wash. 81 (1922), but struck down, 265 U.S. 322 (1924).

[14] See Yamashita v. Hinkle, 260 U.S. 199 (1922).

bank; become firemen, policemen, or sheriffs; or sell alcohol. Washington statutes required citizenship or intended citizenship in a variety of licensed occupations, including accountants, architects, beauticians, dentists, lawyers, chiropractors, and pharmacists[15]. Clearly, when Asian immigrants were ineligible for citizenship, the operation of these statutes precluded participation by many Asians from these activities and occupations.

In the area of public education, Asian school children have long been the victims of racial segregation. In 1885, a young Chinese girl sued to obtain permission to attend the San Francisco public schools after school officials denied her admission. In Tape v. Hurley, 66 Cal. 473, 6 P. 129 (1885), the California Supreme

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[15] See Hsieh v. Civil Service Commission, 79 Wash. 2d 529, 548-549, 550-552, 488 P.2d 515 (1971)

Court ordered that she be admitted. Thereafter, California's legislature passed a bill in 1885 which stated:

> Every school, unless otherwise provided by law, must be opened for the admission of all children between 6 and 21 years of age . . . Trustees shall have the power to exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for children of Mongolian or Chinese descent. When such separate schools are established, Chinese or Mongolian children must not be permitted into any other school[16].

The segregated San Francisco school system was upheld against constitutional attack in the California State Supreme Court in Wong Him v. Callahan, 119 F. 381 (9th Cir. 1902). A similar challenge to the exclusion of Chinese Americans from white schools was denied by the U.S. Supreme Court in Gong Lum v. Rice, 275 U.S. 323 (1927). In this case, a Chinese

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[16] Act of March 12, 1885, ch. 117, §1, 1885 Cal. Stat. 99 (1885).

American named Martha Lum wanted to go to a white school in Rosedale, Mississippi, but school officials ordered her to go to a segregated black school. Said the Court:

> The question is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished education equal to that offered to all[17].

The Court said there was no denial of equal protection relying on the case which established the "separate and equal" doctrine, Plessy v. Ferguson[18].

Segregation was not limited to the schools. In Seattle, segregated housing conditions limited Asians to certain parts of the city. The use of "restrictive covenants" prohibited Asians from residing in such areas as Magnolia, Broadmoor, Ballard, and the Lake Washington districts.

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[17] 275 U.S. at 79.

[18] Plessy v. Ferguson, 163 U.S. 537 (1896).

Asians moved into the First Hill area and the Beacon Hill area because these areas were the only ones in Seattle not covered by restrictive covenants[19]. The use of privately created restrictive covenants was upheld by the United States Supreme Court, Corrigan v. Buckley, 271 U.S. 323 (1926). The use of such covenants and court enforcement probably contributed to the maintenance of Chinatowns, Japantowns, and Manilatowns in Seattle.

2. Asian Americans still suffer from the effects of past discrimination.

In the last twenty-five years, great strides have been made in the area of civil rights. Laws discriminating against Asian Americans and other minorities have been struck down, primarily on the basis of

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[19] Chin, Golden Tassels, a History of Chinese in Washington, 1857-1977 (Seattle: Art Chin, 1977) p. 53.

the equal protection clause of the Fourteenth Amendment. The central purpose of the Fourteenth Amendment was to guarantee equality for blacks, e.g., Slaughterhouse Cases, 16 Wall. 36 (1873) and by extension, it has come to afford equal protection for other minority groups including Asians. See e.g. Graham v. Richardson, 403 U.S. 365, 29 L. Ed 2d 534, 91 S. Ct. 1848 (1971); Oyama v. California, 332 U.S. 633 (1948); Yick Wo v. Hopkins, 118 U.S. 356 (1886). Those racial and national origin classifications struck down involved either unequal treatment of a minority group, e.g. Yick Wo v. Hopkins, supra (discriminatory application of an ordinance) or the exclusion of minority groups from participation in the majority social institutions, with the resulting stigma of inferiority. See Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed 873 (1954).

Brown v. Board of Education, supra, is the landmark case in the area of establishing equal opportunities in public education. In striking down the "separate but equal" doctrine of Plessy v. Ferguson, supra, the 1954 U.S. Supreme Court said:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such a right, where the state has undertaken to provide, is a right which must be made available to all on equal terms.

347 U.S. at 493.

Yet, despite Brown, supra, Asians are still being denied equal educational opportunities.

In 1971, the U.S. Supreme Court ruled in Lau v. Nichols, 414 U.S. 563, 39 L. Ed 2d 1, 94 S. Ct. 786 (1974), that special educational benefits must be provided to 1,800 Chinese speaking school children in San Francisco who were linguistically disadvantaged due to their race and

culture. In ordering bilingual instruction pursuant to Title VI of the 1964 Civil Rights Act, the Court said:

> Discrimination is barred which has that effect even though no purposeful design is present . . . It seems obvious that the Chinese speaking minority receives fewer benefits than the English speaking majority from the school system which denies them a meaningful opportunity to participate in the education program.

The Supreme Court concluded that "students who do not understand English are effectively foreclosed from any meaningful education" and that school districts are obligated to provide educational programs to meet such special needs of its minority students. Lau v. Nichols, supra, 414 U.S. at 566. Asians constitute the largest group of students in the Seattle School District who do not understand English and require special bilingual instruction. In designing the desegregation program, the Seattle School District has responsibly

met these special needs of Asian school children. Bilingual students have been coordinated into the desegration effort[20].

In 1973, in DeFunis v. Odegard, 416 U.S. 312, 40 L. Ed 2d 164, 94 S. Ct. 1704 (1974), a white student challenged the minority admissions program at the University of Washington Law School on the claim of "reverse discrimination". At that time, Japanese and Chinese Americans were not considered minorities by the Law

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[20] In fact, when bilingual students are counted, the number of minority students being bused is more than a thousand (1,333) more than the number of white students. Without counting bilingual students, approximately 153 more minority students than white students are bused. See the Seattle Plan For Eliminating Racial Imbalance, Fifth Year Summary Report in Response to Community and School Board Members' Questions, a report prepared by the Seattle School District's Division of Evaluation Services attached to a memo from David Colwell to Donald Steele, entitled "Facilities Consolidation impacts and Desegregation Implementation", December 15, 1981.

School. Although the case was held to be moot, Justice Douglas wrote an opinion finding the minority admission program to be unconstitutional. But he also said that preferential admissions might be sustained if its purpose was to remedy past discriminations and noted that:

> if that were the standard, the current University of Washington policy would surely fail, for there is no western state which can claim that it always treated Japanese and Chinese in a fair and even-handed manner.

416. U.S. at 316[21].

To this very day, Asian Americans are still subject to the effects of racially segregated school systems. See Guey Hueng Lee v. Johnson, 404 U.S. 1215 (1971) (San Francisco school system); Soria v. Oxnard

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[21] Shortly after, the U.S. Law School changed its minority admissions policy to include Japanese and Chinese.

School District, 386 F. Supp. 539 (C.D. Cal. 1970); Crawford v. Board of Education of the City of Los Angeles, 17 Cal. 3rd 280, 94 Cal. Rptr. 531 (1976). Although these case concerned public school districts in California, these involved school districts which had a sizeable Asian American population[22]. The Seattle School District has currently an Asian student population of 7,300, approximately 15.1% of the total student population of 48,415[23]. A vast majority of these Asian Students live in Southeast Seattle, an area where much of Seattle's minority population

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[22]The 1970 U.S. Census data indicates that 110,000 Asian Americans lived in the City and County of San Francisco and another 238,000 lived in Los Angeles County.

[23]See Footnote #3.

resides[24]. A recent study conducted by the Seattle School District indicates that if students were confined to the nearest or next nearest school, twenty-six schools would be racially imbalanced, almost all of which are located in Southeast Seattle[25]. Nineteen of these schools are at the elementary level[26].

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[24] The Southeast Seattle area has many census tracts which the total minority student population of the census tract population is above 80%. See Seattle Public Schools 1980-1981 Racial Distribution of Students and Staff, Vol. 1, p. 108.

[25] See Seattle Public Schools, The Seattle Plan For Eliminating Racial Imbalance, Fifth Year Summary Report in Response to Community and School Board Members' Questions, p. 8-9, attached as part of a December 15, 1981 memo from David Colwell to Donald Steele entitled "Facilities Consolidation Impacts and Desegregation Implementation.

[26] Ibid.

In Johnson v. San Francisco United School District, 339 F. Supp. 1315 (N.E. Cal. 1971), vacated and remanded on other grounds, 500 F. 2d 349 (9th Cir. 1974), the San Francisco public schools were found to be racially segregated. In an opinion supporting a plan for desegregation, Federal District Court Judge Weigel said:

> And there are solid reasons for supporting the parties in the plans for desegregation of all races. The multiplicity of racial backgrounds makes effective desegregation more, not less, important. All who testified on the subject were unanimous in pointing out that the evils of racism and ethnic intolerance are not limited to black and white alone. Those who oppose desegregation, however well intentioned, would deprive children of the most meaningful opportunity to know members of different races. Opposition to desegregation fosters false concepts of racial superiority and racial inferiority. And opposition to desegregation in the elementary schools is particularly ill-advised. It works to prevent the kind of exchange in formative years which best inoculates against racial hatred. Racial hatred is an adult rather than a childhood disease.

339 F. Supp. at 1320.

This statement applies with equal force to the Seattle Plan. Asian Americans have fought hard for their right to equal opportunities under the law. The right to equal educational opportunity is well established. Any attempt to interfere with the Seattle desegregation plan, however well intentioned, should be weighed against the constitutional right to equal educational opportunity.

C. Initiative 350 Created An Impermissible Racial Classification Which Placed Special Burdens On The Attainment Of Policies Favoring Minorities.

A law which differentiates on the basis of race, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. Brown v. Board of Education, 347 U.S. 483 (1954). Unless there is a compelling state interest which cannot be achieved in another way, such a law will be

struck down under the Fourteenth Amendment of the United States Constitution. The district court and the Court of Appeals properly relied on Hunter v. Erickson, 393 U.S. 385 (1969) and Lee v. Nyquist, 318 F. Supp. 710 (W.D. N.Y., 1970), aff'd, 402 U.S. 935 (1971), in ruling that Initiative 350 created invidious racial classifications unjustified by any compelling state interest.

In Hunter v. Erickson, supra, this Court held that §137 of the Akron, Ohio City Charter violated the Fourteenth Amendment. Section 137 prevented the city council from implementing any ordinance dealing with racial, religious or ancestral discrimination in housing without the approval of a majority of the voters. The Court invalidated that law because it created, "an explicitly racial classification treating racial housing matters

differently from other racial and housing matters." Id. at 389. Although seemingly neutral on its face, §137 specifically singled out one category (anti-discrimination housing ordinances) and made it much harder for the beneficiaries of such ordinances (minorities) to get them enacted. The reality is that the law's impact falls on the minority by placing "special burdens" on racial minorities within the governmental process. Id. at 391.

A three-judge court held Hunter dispositive of the question presented in Lee v. Nyquist, supra. In that case a New York statute prohibited state education officials and appointed school boards (but not elected boards) from assigning students to different schools for the purpose of achieving racial balance. Hunter, according to the court in Lee v. Nyquist, stands

for the rule that "the state creates an implicit racial classification whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area. Id. at 718.

The New York Statute in Lee v. Nyquist had the same effect in that it created a single exception to the broad supervisory powers that the state Commissioner of Education exercised over local public education. The exception placed burdens on the implementation of educational policies designed to deal with race on the local level, operated in practice as a racial classification, was not excused by any compelling interest and was, therefore, a violation of the Fourteenth Amendment. Id. at 718-19. The court noted that the statute must fall because it structures the internal governmental process in a manner

not founded on neutral principals. Id. at 720. This Court expressed its approval by summarily affirming this lower court ruling.

Initiative 350 is like the charter provision in Hunter and the statute in Lee. It creates a racial classification, treating racial student assignment matters in education differently from other student assignment matters. It singled out and negates one of the many school district powers (assigning students to schools other than their nearest or next nearest school) while allowing school districts to asign students beyond their next nearest school for almost any other reason. The law's impact falls clearly on the minority student, by dismantling operative public school desegregation programs, preventing future local adoption of such programs and requiring minority students to initiate

expensive lawsuits to enforce their constitutional rights. Inititiative 350 is precisely targeted at voluntary local adoption of desegregation plans, and thus specifically burdens and, in fact, forecloses the attainment of important minority educational goals through the political process. It structures the political process in a non-neutral manner.

If Initiative 350 is allowed to go into effect, the schools in Seattle will once again be racially imbalanced. This will undoubtedly place special burdens on racial minorities because their children will be returned to racially segregated schools and they will be denied access to a full and meaningful education. Under a voluntary bussing plan which would result if 350 is upheld, the burden will fall on minority children to transfer to other schools as has occurred prior to implementation of the Seattle Plan. (See Siqueland,

"Without a Court Order", Madrona Publishers, 1981, p. 21).

History and current events teach us that today, unconstitutional laws will discriminate in a much more subtle manner than in the past because they will be designed to withstand legal scrutiny. Initiative 350 was drafted specifically to destroy Seattle's bussing plan and to survive a constitutional challenge. An informed reading of its language discloses its racially discriminatory purpose and intent. The Initiative was proposed to and accepted by the electorate as such. [RT 166-69, 192-93, 203, 275, 462-64, 466, 678, 738-40, 791-93, 1163, 1169, 1177-78, 1185; Exs. 38-40; Ex. 41, pp. 62-3, 64; Ex. 43, pp. 8-10; Ex 56; Ex. 95, pp. 16-21; Ex. 130, pp. 3-5.] The district court below also recognized this fact. [See District Court's Finding of Fact P. 7-9.] Unless

this Court reaffirms the constitutional infirmities of Initiative 350, an open invitation will go out to legislators to achieve constitutionally forbidden goals by art fully worded statutes. This Court has long ruled that a law, though racially neutral on its face, will not be constitutionally tolerated if it is an obvious pretext for discrimination. Yick Wo. v. Hopkins, 118 U.S. 356, (1886).

Because the state has failed to put forth any compelling interest for Initiative 350, the Court of Appeals'conclusion that it creates an impermissible racial classification in violation of the Fourteenth Amendment to the United States Constitution should be affirmed.

D. Assuming Hunter v. Erickson, Supra, And Lee V. Nyquist, Supra, Do Not Control, Initiative 350 Is Invalid Because It Was Enacted With The Intent To Discriminate On Racial Grounds And Therefore Violates The Fourteenth Amendment Of The United States Constitution.

It is well established that in order to challenge state action, such as Initiative 350, on the grounds such action results in unconstitutional racial discrimination and is a violation of the Equal Protection Clause of the Fourteenth Amendment, the challenging party must allege and prove the existence of a discriminatory intent and not just disproportionate impact. Personnel Administrator of Massachusetts v. Fenney, 442 U.S. 256 (1979); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). This requirement has been applied in a school desegregation case. Columbia Board of Education v. Penick, 443 U.S. 449 (1979). However, it is equally well established that this Court does not intend to vitiate the protection of the Fourteenth Amendment by making it impossible to satisfy this requirement.

Washington v. Davis, supra, and its progeny consistently hold that discriminatory intent may be inferred from all the surrounding facts and circumstances. Washington v. Davis, supra, involved the validity of a written test given to police officer candidates in the District of Columbia. While this Court found the plaintiffs had shown a profound discriminatory impact which excluded a high number of black candidates, this Court upheld the test because the plaintiffs had failed to prove a discriminatory intent. This Court stated:

> This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race, Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed. 220, 65 S.Ct. 1064 (1886).

Id. at 242.

This Court proceeded to state:

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, it is true, that the law bears more heavily on one race than another . . . . Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.

Id. at 242.

Village of Arlington Heights, supra, involved a question whether refusal by a zoning board to permit construction of low-income housing constituted racial discrimination. This Court upheld the action of the board and reaffirmed the requirement of proving discriminatory intent. In addition, this Court set forth the following examples of direct and

circumstantial evidence which could be used to show such intent:

1. Disproportionate discriminatory impact on one race.
2. The historical background of the decision (the sequence of events leading to it which include departures from normal procedural sequences).
3. The legislature or administrative history of the action.

429 U.S. at 267.

A more recent discussion by this Court on what is "discriminatory purpose" is found in Personnel Administrator of Massachusetts v. Feeney, supra. In that case a female challenged a Massachusetts law giving veterans lifetime preference for state employment on the grounds such law discriminated on the basis of gender and

violated the Fourteenth Amendment. This Court found the law not violative of equal protection in part because the law did not reflect a discriminatory purpose. This Court stated:

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences (citation omitted). It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

442 U.S. at 279.

A careful reading of Personnel Administrator of Massachusetts v. Feeney and how lower courts have interpreted that case makes it clear that it is not the intention of this Court to impose a requirement that the appellees in this case and the other parties challenging Initiative 350 show that such Initiative was adopted in part "because of" a deliberate

purpose to cause a racially discriminatory impact. Instead, Personnel Administrator of Massachusetts v. Feeney reaffirms the proposition in Washington v. Davis that discriminatory intent may be inferred from the surrounding facts and circumstances:

> This is not to say that the inevitability or forseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of ch 39, §23, a strong inference that the adverse effects were desired can reasonably be drawn. (Emphasis added)

Id. at n. 25.

The Fifth Circuit in Lee v. Lee County Board of Education, 639 F.2d 1243 (1981), interpreted Personnel Administrator of Massachusetts v. Feeney to be consistent with Washington v. Davis and its progeny. In Lee, that court affirmed the district court's denial of a motion by the United

States for interdistrict relief to desegregate a school in part because the record failed to establish a racially discriminatory intent by the city. That court stated:

> Although Feeney makes clear that the intent required to support a finding of unconstitutional discrimination is a species of specific rather than general intent, Feeney did not alter the decisions in Washington v. Davis, supra, or Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L. Ed.2d 450 (1977), where the Court noted that a racially discriminatory intent might properly be inferred from circumstantial evidence.

Id. at 1268.

Based upon the facts and circumstances surrounding Initiative 350, this Initiative, even though a reflection of the majority of the people of the State of Washington, must be invalidated on the grounds that it was enacted in part because of impermissible and unconstitutional

racial discrimination and it therefore violates the Fourteenth Amendment. First the disproportionate and negative impact of Initiative 350 on Asians and other racial minorities is indisputable. The nullification by Initiative 350 of appellees' desegregation plan will result in dramatic increases in school segregation.

Second, the historical background of Initiative 350, the sequence of events leading to the enactment and the legislative and administrative history of the Initiative make it evident that it was intended to nullify the Seattle Plan and return the schools to their previous segregated state. (See appellees' complaint and memorandum in support of motion for preliminary injunction.) Initiative 350 was the final step in a concerted plan of opponents of mandatory bussing to prohibit this major part of the Seattle Plan. Leaders of CiVIC, the prime movers

behind Initiative 350, have admitted in deposition that this was the intent of the measure. (See p. 84 of the deposition of Robert Dorse attached as Exhibit C to the Affidavit of Michael W. Hoge). It is also evident from the long list of exceptions to the prohibitions of Initiative 350 that the only thing it was intended to prevent was reassignment of students to promote integration in the schools.

Third, even assuming Initiative 350 is neutral on its face, the inevitability and forseeability of the consequences resulting from its enactment, that is the return to segregation in Seattle schools, leads one to reasonably infer this result was intended. Finally, this Court in Village of Arlington Heights v. Metropolitan Housing Corp. concluded that there is no need to show that the discriminatory intent was the primary purpose of the measure as long as it was a motivating

factor, 429 U.S. at 255, and the totality of the circumstances related to the promulgation and passage of Initiative 350, strongly suggests that at least one motivating purpose, if not the dominant purpose, of the measure was to halt Seattle's desegregation plan.

CONCLUSION

Initiative 350 creates an impermissible racial classification not justified by any compelling state interest and should be declared unconstitutional. Furthermore, the Initiative was enacted with the intent to discriminate on racial grounds and should on this additional basis be declared unconstitutional.

Respectfully submitted,

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